

CIMB BANK BHD

A

v.

**WORLD NOVA SDN BHD;
PANG MING WA (INTERVENER)**

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HIGH COURT MALAYA, JOHOR BAHRU
MOHD ZAWAWI SALLEH JC
[ORIGINATING SUMMONS NO: MT(3) 24-254-2002]
28 SEPTEMBER 2009

AUCTIONS AND AUCTIONEERS: *Remuneration of auctioneer - Taxation of bill of costs - Review of registrar's certificate - Exercise of registrar's discretion - Rules of the High Court 1980, O. 59 r. 36 - Johor Auction Sales Enactment 1932, r. 7(a), (b)*

C

CIVIL PROCEDURE: *Costs - Review of registrar's certificate - Taxation of auctioneer's bill of costs - Exercise of registrar's discretion - Rules of the High Court 1980, O. 59 r. 36 - Johor Auction Sales Enactment 1932, r. 7(a), (b)*

D

CIVIL PROCEDURE: *Costs - Bill of costs - Review of registrar's certificate - Taxation of auctioneer's bill of costs - Exercise of registrar's discretion - Rules of the High Court 1980, O. 59 r. 36 - Johor Auction Sales Enactment 1932, r. 7(a), (b)*

E

CIVIL PROCEDURE: *Costs - Taxation - Review of registrar's certificate - Taxation of auctioneer's bill of costs - Exercise of registrar's discretion - Rules of the High Court 1980, O. 59 r. 36 - Johor Auction Sales Enactment 1932, r. 7(a), (b)*

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CIVIL PROCEDURE: *Locus standi - To intervene in taxation proceedings - Whether rights of proposed intervener directly affected by proceedings*

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This was an application under O. 59 r. 36 of the Rules of the High Court 1980 ('RHC') by the proposed intervener to review the decision of the learned deputy registrar ('DR') under r. 7(a) of the Johor Auction Sales Enactment 1932 ('Enactment'). The DR had taxed the auctioneer's bill of costs on 4 January 2008 and had allowed a sum of RM118,007.50 as his remuneration for an auction scheduled on 12 July 2007 that was aborted by an order of the High Court. The proposed intervener submitted that the DR had exercised his discretion erroneously and, thus, his decision ought to be set aside. He averred that under r. 7(a) of

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A the Enactment ('r. 7(a)'), the DR may only exercise his discretion in determining the "remuneration" of the auctioneer by way of taxation according to O. 59 of the RHC and not according to r. 7(b) of the Enactment ('r. 7(b)'). The auctioneer, on the contrary, contended that the DR had applied the correct principles when he used r. 7(b) as a guide when exercising his discretion under r. 7(a). The auctioneer further submitted that this court should not interfere with the quantum allowed by the DR, and that the proposed intervener had no *locus standi* to participate in the taxation proceedings.

C **Held (allowing the application):**

- (1) The DR erred in using r. 7(b) of the Enactment ('r. 7(b)') as a guide for the exercise of his discretion under r. 7(a) as they were distinct and applied to different situations. Rule 7(b) is only applicable where the auction was postponed because the reserve price was not met and the auctioneer is only entitled to half of the full commission payable, while r. 7(a) is applicable to an auction postponed pursuant to an order of the court and the remuneration payable is at the discretion of the taxing officer. The discretion under r. 7(a) has nothing to do with the provisions of r. 7(b). (para 15)
- (2) Rule 7(a) is very clear. It does not provide that the taxing officer can "fix" the auctioneer's remuneration. All that it provides is that the auctioneer's remuneration shall be at the taxing officer's discretion. Since the legislature uses the words "discretion of the taxing officer", it must mean that there must be taxation, and what else can a taxing officer do except to tax costs. Rule 7(b) does not refer to any taxing officer. It merely fixes the "commission" of the auctioneer. Taxation must be carried out according to the established principles and shall have regard to various factors such as the properties involved, the time expended and whether any special skill was exercised. By cleaving rigorously to r. 7(b), the DR had fettered his discretion to judicially consider all circumstances which are relevant to the case. Each case has to be considered on its own merits and is subject to the taxing officer's own discretion. A person or body conferred with duties or with discretionary powers to make decisions may not avoid his or its duties or fetter himself or itself in the discharge of such duties. Such fettering of discretion may be way of a fixed rule.

By using r. 7(b) as a guide, the DR may promote legal certainty and consistency in awarding the auctioneer's fee, but he was fettering his discretion to consider or respond flexibly to unusual situations or to consider each case on its own merits. *Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd Intervener)* (foll); *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v. Tan Beng Sooi* (foll); *Public Bank Bhd v. Er Cheng Chau* (foll). (para 17)

- (3) It was the considered opinion of this court that the ground for review in this case was not limited to a question of quantum. The DR in the present instance had exercised his discretion capriciously or mischievously, and had failed to take into account, on the facts, pertinent factors. In short, he had merely awarded what was billed by the auctioneer without proper taxation. *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* (foll). (paras 21 & 22)
- (4) The auctioneer's contention that the proposed intervener had no *locus standi* to participate in the taxation proceedings had no merit. The proposed intervener in this instance should be given an opportunity of being heard because his rights would be affected by the DR's decision. His "legal interest", rights or liabilities would be directly affected by these proceedings. *Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd Intervener)* (foll). (paras 24 & 25)
- (5) In conclusion, the award of RM118,007.50 was clearly a result of the application of wrong principles and, hence, was devoid of any basis. What was glaring in this case was that the auctioneer submitted a bill of costs to claim "commission" when all that he was entitled to was "remuneration". (para 26)

[Order accordingly.]

Case(s) referred to:

- Bar Council v. Datuk V Kanagalingam* [2000] 3 CLJ 697 FC (**refd**)
- Chan Kok Choon JP v. MBF Finance Bhd* [2000] 4 CLJ 453 CA (**refd**)
- Chin Choy & Ors v. Collector of Stamp Duties* [1979] 1 MLJ 169 (**refd**)
- Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* [2002] 4 CLJ 259 FC (**refd**)
- Ketua Pengarah Hasil Dalam Negeri v. Damansara Jaya Sdn Bhd* [1999] 7 CLJ 481 HC (**refd**)
- Maror & St. Mellons Rural District Council v. Newport Corporation* [1952] AC 189 (**refd**)

- A *MC Corbett v. Ipoh Tin Dredging Ltd* [1934] 1 LNS 46 (**refd**)
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd
[2002] 1 CLJ 645 FC (**refd**)
Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v. Tan Beng Sooi
[1997] 2 CLJ 409 CA (**fol**)
- B *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713 CA (**refd**)
Public Bank Bhd v. Er Cheng Chau [1994] 4 CLJ 971 HC (**fol**)
Sarjit Singh Kahira v. State Public Service Commission, Sarawak [2007] 5
CLJ 156 HC (**refd**)
Starlite Ceramic Industry Ltd v. Hiap Huat Pottery [1973] 1 LNS 143 (**refd**)
Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance
Berhad Intervener) [1995] 2 CLJ 846 HC (**fol**)
- C *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin*
[2007] 2 CLJ 332 FC (**refd**)
United Malayan Banking Corp Bhd v. Syarikat Perumahan Luas Sdn Bhd
[1991] 1 CLJ 594; [1991] 4 CLJ (Rep) 163 HC (**fol**)
- D *United Oriental Assurance Sdn Bhd v. Penang Medical Centre Sdn Bhd*
[1999] 2 CLJ 583 CA (**refd**)
Vincent Cheng Kim Chuan v. The Minister For Home Affairs & Ors [1992]
2 CLJ 945; [1992] 4 CLJ (Rep) 527 HC (**refd**)
Warburton v. Loveland [1932] 2D & Cl (HL) 480 (**refd**)
Woodward v. Watt [1853] 2 E & B 452 (**refd**)
- E *Yeo Peck Chie v. KS Gill & Co* [1946] MLJ 131 (**refd**)

Legislation referred to:

Johor Auction Sales Enactment 1932, rr. 5, 7(a), (b)
Rules of the High Court 1980, O. 59 rr. 20, 21(2), 36

F Other source(s) referred to:

de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th
edn, paras 13-028, 1-01, 11-004

For the plaintiff - Leney Andrew Albert; M/s Syed Alwi, Ng & Co

For the intervener - LS Chin; M/s Hema Rubini & Co

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Reported by Suresh Nathan

JUDGMENT

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Mohd Zawawi Salleh JC:

- I [1] This application under O. 59 r. 36 of the Rules of High
Court 1980 (the RHC) was brought before me by the proposed
intervener to review the learned deputy registrar's decision under
r. 7(a) of the Johor Auction Sales Enactment 1932 ("the
Enactment").

[2] The learned deputy registrar had taxed the Auctioneer's Bill of Cost on 4 January 2008 and had allowed a sum of RM118,007.50 as his remuneration for an auction scheduled on 12 July 2007 that was aborted by an order of the High Court. A

[3] After hearing the parties, I allowed the application. B

[4] By way of background, it is material to state the facts which gave rise to the present application. The undisputed facts are as follows:

4.1 Chang Keok Hai ("the auctioneer") was appointed for the auction of properties ordered to be sold by the High Court of Johor Bahru under the following foreclosure proceedings: C

(a) Johor Bahru High Court Originating Summons No. 24-254-2007: *Southern Bank Berhad v. World Nova Sdn Bhd* ("Suit 254"); and D

(b) Johor Bahru High Court Originating Summons No: 24-2202-2002: *Southern Bank Berhad v. World Nova Sdn. Bhd* ("Suit 2202"). E

4.2 The auction was scheduled on 12 July 2007;

4.3 Prior to 12 July 2007, there were several postponements of the auctions scheduled. These auctions were not postponed due to any order of the High Court. The auctioneer claimed and was paid his commission as determined according to r. 7(b) of the Enactment; F

4.4 The last auction was scheduled on 12 July 2007. However, the said auction was aborted on the order of Jeffrey Tan J on 11 July 2007 for the following reasons: G

(a) Pang Ming Wa, the proposed intervener, has filed the following application:

For Suit 254: H

(i) Application to intervene (encl. 43);

(ii) Application to set aside order for sale dated 6 August 2003 (encl. 44); and I

(iii) Application to stay order dated 6 August 2003.

- A For Suit 2552:
- (i) Application to intervene (encl. 20);
- (ii) Application to set aside order dated 18 March 2004 (encl. 21); and
- B (iii) Application to stay order dated 18 March 2004.
- (b) The application was scheduled for hearing before Jeffrey Tan J on 11 July 2007. As the applications were not served on the chargor (World Nova Sdn Bhd), as it was already wound up, the learned judge directed that the cause papers be served on the official receiver instead.
- C (c) The learned judge was prepared to postpone the auction on 12 July 2007 provided the issue of costs can be resolved;
- D (d) It was agreed by the parties on 11 July 2007 that:
- E (i) The proposed intervener will deposit RM121,497.50 with the chargor's solicitors by 10am of 12 July 2007 to secure the auctioneer's fees and expenses thrown away for the aborted auction; and
- F (ii) The proposed intervener will pay RM7,000 as cost of the day by the next hearing date.
- 4.5 The learned judge ordered the auction 12 July 2007 to be aborted on the terms agreed. The agreed sums were deposited and paid and the auction on 12 July 2007 was aborted;
- G 4.6 The chargor and chargee eventually reached a settlement over the subject matter of the claims;
- H 4.7 The auctioneer had done all things necessary for the said auction including to the following:
- I (i) Preparing the proclamation in four languages;
- (ii) Distribution of the proclamation of sale to residents, bankers, solicitors and to public at large;
- (iii) Posting the proclamation of sale at the places where the properties are located;

- (iv) Posting the proclamation of sale at the Johor Bahru High Court notice board; and A
- (v) Advertising the proclamation of sale in “The Star” and “Sin Chew Jit Poh” newspapers on 14 June 2007.
- 4.8 The said auction involved seven pieces of properties at a total reserve price of RM46,980,000; B
- 4.9 The auctioneer submitted a Bill of Cost dated 16 July 2007. 3 (three) main items were claimed: C
- (a) RM117,507,500 – fee claimed pursuant to r. 5 of the Enactment;
- (b) RM851 – out of pocket expenses; and
- (c) RM804 – for disbursements. D
- 4.10 The auctioneer enclosed the bill of costs to the chargee’s solicitor *vide* a letter dated 25 July 2007. The letter stated:
- ... The auction scheduled on 12.7.2007 was called off at your request, as we come to understand that the Intervener has in time placed a banker cheque with your office to cover all auctioneer’s fees, costs and commission as stated in your letter of 11.7.2007. E
- We enclose herewith our Bill of Costs dated 16.7.2007 for RM119,162.50 duly approved and certified by the Johor Bahru High Court for your early settlement ... F
- 4.11 A copy of the bill of cost was forwarded to the proposed intervener’s former solicitors. By a letter dated 22 August 2007, the proposed intervener’s solicitors wrote to the registrar of the High Court requesting for a taxation of the auctioneer’s bill of cost; G
- 4.12 The learned deputy registrar taxed the bill of costs on 3 December 2007. The decision was rendered on 4 January 2008. The learned deputy registrar allowed the sum of RM118,007.50 as claimed by the auctioneer; and H
- 4.13 The proposed intervener filed an application to review the decision. The grounds for review were set out in the proposed intervener’s objection to taxation (“Bantahan Ke I

- A Atas Penetapan”). (See encl. 62, exh. LC1). The learned deputy registrar maintained his decision to award RM118,007.50, *inter alia*, on the following grounds:
- B (a) that he has discretion pursuant to r. 7(a) of the Enactment to award the costs;
- (b) that he may use and indeed used r. 7(b) of the Enactment as a guideline to exercise his discretion under r. 7(a); and
- C (c) that the amount awarded was reasonable.

Submission By Learned Counsel For The Proposed Intervener

- D [5] Learned counsel for the proposed intervener submitted that the learned deputy registrar had exercised his discretion erroneously and hence his decision ought to be set aside. According to learned counsel, there are 3 (three) distinct points that must be noted of the Enactment, particularly r. 7(a) and 7(b):
- E (a) Rule 7(a) covers an auction that was postponed by an order of court whilst r. 7(b) covers an auction that was postponed because the reserve price was not reached;
- F (b) under r. 7(a), only “remuneration” is payable and the amount is determined according to the discretion of the taxing officer. Learned counsel submitted that “remuneration” must be taxed; and
- G (c) under r. 7(b), only “commission” is payable. The amount is determined according to the scale of fees set out in r. 5 of the Enactment where an auctioneer is only entitled to half of the full fee as determined pursuant to the scale of fees under r. 5. In other words, there is a fixed scale fee for commission.
- H [6] Learned counsel further submitted that it is not disputed that the auction on 12 July 2007 was aborted by an order of the High Court on 11 July 2007. Thus, the auctioneer is only entitled to be paid “remuneration” under r. 7(a) of the Enactment, the amount of which is to be determined by taxation according to the discretion of the taxing officer. Taxation of the auctioneer’s
- I “remuneration” under r. 7(a) must comply with the provisions of the RHC particularly O. 59 r. 20 and 21 and must also comply with established principles of taxation.

[7] To support his argument, learned counsel cited the following decisions: A

(a) *Public Bank Berhad v. Er Cheng Chau* [1994] 4 CLJ 971;

(b) *Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Berhad Intervener)* [1995] 2 CLJ 846; and B

(c) *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi* [1997] 2 CLJ 409 (Court of Appeal).

These are the only three reported cases or authorities on the Enactment. C

Submission By Learned Counsel For The Auctioneer

[8] Learned counsel for auctioneer submitted that the learned deputy registrar had applied the correct principle in awarding the auctioneer's remuneration when he exercised his discretion and taxed the auctioneer's remuneration and allowed the sum of RM118,007.50. D

[9] In this instant case, the auctioneer had done everything for the preparation of the auction and was ready, willing and able to conduct the auction which was fixed on 12 July 2007. The auction was only aborted on the morning of the auction and as such, the auctioneer should be entitled to the remuneration as deemed fit by the taxing officer under r. 7(a). A proper guide for the taxing officer in this case is r. 7(b) which states the remuneration which the auctioneer is entitled to if no sale takes place. The question that has to be answered is why should the auctioneer be entitled to anything less than if the auction had proceeded and if no sale took place? Learned counsel submitted that the learned deputy registrar was correct in being guided by r. 7(b) in fixing the remuneration of the auctioneer in this instant case. E F G

[10] Learned counsel urged this court not to interfere with the discretion of the taxing officer upon a mere question of quantum if the taxing officer has exercised his discretion correctly and after considering all the circumstances. H

[11] To support his submission, learned counsel cited the following decisions: I

- A (a) *Starlite Ceramic Industry Ltd v. Hiap Huat Pottery* [1973] 1 LNS 143;
- (b) *Chan Kok Choon JP v. MBF Finance Bhd* [2000] 4 CLJ 453;
- B (c) *Bar Council v. Datuk V Kanagalingam* [2000] 3 CLJ 697;
- (d) *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* [2002] 4 CLJ 259;
- C (e) *United Malayan Banking Corp. Bhd v. Syarikat Perumahan Luas Sdn. Bhd.* [1991] 4 CLJ (Rep) 163;
- (f) *Ketua Pengarah Hasil Dalam Negeri v. Damansara Jaya Sdn Bhd* [1999] 7 CLJ 481;
- D (g) *Vincent Cheng Kim Chuan v. The Minister For Home Affairs & Ors* [1992] 2 CLJ 945; [1992] 4 CLJ (Rep) 527;
- (h) *Sarjit Singh Kahira v. State Public Service Commission, Sarawak* [2007] 5 CLJ 156;
- E (i) *United Oriental Assurance Sdn. Bhd v. Penang Medical Centre Sdn Bhd* [1999] 2 CLJ 583; and
- (j) *MC Corbett v. Ipoh Tin Dredging Ltd* [1934] 1 LNS 46.

The Findings Of The Court

- F [12] To my mind, the only issue to be determined in instant case is this: Whether the learned deputy registrar has exercised his discretion correctly under r. 7(a) of the Enactment. The relevant rule reads:
- G 7(a) Where the order for sale by public auction is cancelled or the sale is postponed by order of Court before the completion of the sale the remuneration of the auctioneer shall be at the discretion of the taxing officer.
- H (b) Where property is put up by public auction but no sale takes place by reason of the reserve price not being reached the auctioneer shall receive half the commission which would have been payable under r. 5 calculated on such reserve price, provided that where at one sale the reserve price on some lots is reached and the reserve price on the other lots
- I is not reached the sale price of the lots sold shall be

aggregated with the reserve price of the lots unsold and the rate of commission on both the lots sold and the lots unsold shall be based on the total of such sale and reserve prices so aggregated.

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[13] It is not disputed by learned counsel for the proposed intervener and auctioneer that r. 7(a) is the applicable provision in this instant case. What is in dispute is what does r. 7(a) entail. Counsel for the proposed intervener had submitted that under r. 7(a), the learned deputy registrar may only exercise his discretion in determining the “remuneration” of the auctioneer by way of taxation. By taxation, it means taxation according to O. 59 of the RHC and not according to r. 7(b).

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[14] Counsel for the auctioneer holds a contrary view. According to him, the learned deputy registrar had applied the correct principles when he used r. 7(b) as a guide when exercising his discretion under r. 7(a). This is because the facts of this case are almost identical to that under r. 7(b) and as such, the learned deputy registrar cannot be faulted for using r. 7(b) as a guide instead of using his discretion and allowing a sum without any sound basis.

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[15] After having carefully considering the submission advanced by learned counsel for the proposed intervener and auctioneer, with respect, this court is in full agreement with the submission of learned counsel for the proposed intervener that the learned deputy registrar had erred in using r. 7(b) as a guide for the exercising of his discretion under r. 7(a). Rule (a) and (b) are distinct and applies to different situations. In this instant case, the learned deputy registrar had failed to consider the distinct situations that require the application of r. 7(a) and (b) of the Enactment. Rule 7(b) is only applicable where the auction was postponed because the reserve price was not met and the auctioneer is only entitled to half of the full commission payable. Rule 7(a) is applicable to an auction postponed pursuant to an order of the court and the remuneration payable is at the discretion of the taxing officer. The discretion under r. 7(a) has nothing to do with the provisions of r. 7(b).

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[16] It is settled law that in construing any statutes, the first task is to look at the words in the legislation and apply the plain meaning of the words in the statute and if there is no ambiguity to the words used, the court is duty bound to accept it even if it

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- A may lead to mischief. The rationale is simple. The court's duty is not to legislate, that duty lies with Parliament. If however the words used are not clear, then the courts may adopt the purposive approach in construing the meaning of the words used (See *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713, *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645, *Chin Choy & Ors v. Collector of Stamp Duties* [1979] 1 MLJ 169, *Yeo Peck Chie v. KS Gill & Co* [1946] MLJ 131, *Maror & St. Mellons Rural District Council v. Newport Corporation* [1952] AC 189 (HL), *Woodward v. Watt* [1853] 2 E & B 452 and *Warburton v. Loveland* [1932] 2D & Cl. (HL) 480).

- [17] In my considered opinion, r. 7(a) of the Enactment is very clear. It did not provide that the taxing officer can "fix" auctioneer's remuneration. All that it provides is that the auctioneer's remuneration shall be at the taxing officer's discretion. Since the legislature used the word "discretion of the taxing officer", it must mean that there must be a taxation. What else can a taxing officer do except to tax cost? It is pertinent to note that r. 7(b) does not refer to any taxing officer. It merely fixes the "commission" of the auctioneer. Taxation must be carried out according to established principles and shall have regard to various factors such as the properties involved, the time expended and whether any special skill was exercised. By cleaving rigorously to r. 7(b) of the Enactment, the learned deputy registrar had fettered his discretion to consider judicially all circumstances which are relevant to the case. Each case has to be considered on its own merits and be subject to the taxing officer's own discretion. The principle is that a person or a body conferred with duties or with discretionary powers to make decisions may not avoid his or its duty or fetter himself or itself in the discharge of such duties. Such fettering of discretion may be by way of a fixed rule. By using r. 7(b) as a guide, the learned deputy registrar may promote legal certainty and consistency in awarding auctioneer's fee, but he is fettering his discretion to consider or respond flexibly to unusual situations or to consider each case on its own merits. (See generally, de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th edn, paras 13-028, 1-01 and 11-004).

- [18] In *Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd Intervener)* (*supra*), Low Hop Bing JC (as he then was) had this to say:

In relation to the construction to be placed on r. 7(a), it is my considered view that the discretion as stated therein cannot be exercised by stipulating a fixed sum *viz* RM100 without hearing the auctioneer, as each case has to be considered on its merits judicially and on established principles having regard to various factors such as the properties involved, the time expended and whether any special skill was exercised.

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[19] Low Hop Bing JC's decision above was upheld by the Court of Appeal in *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v. Tan Beng Sooi* (*supra*). The Court of Appeal held that the registrar must exercise their discretion judicially. The practice of the Johor Bahru High Court by issuing a circular fixing the specific sum due to the auctioneer as his remuneration under r. 7(a) was *ultra virus* the Enactment and has no effect. In other words, under r. 7(a), the taxing officer cannot award cost under r. 7(a) by merely and blindly using a fixed sum.

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[20] The case in point is *Public Bank Berhad v. Er Cheng Chau* (*supra*), where Low Hop Bing JC (as he then was) held that the remuneration of an auctioneer must be taxed and the word "taxed" means the taxation of costs according to the provisions of the rules of the RHC particularly O. 59, 20 and 21. At p. 976, the learned JC said:

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Dalam penghakiman saya, perkataan "taxed" dalam kaedah tersebut bermakna pentaksiran kos dengan mengikuti Kaedah-Kaedah Mahkamah Tinggi, 1980, terutama A. 59, k. 20 dan 21 yang memperuntukan bahawa:

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20. Sesuatu pihak yang berhak kepada penetapan apa-apa kos mestilah memulakan prosiding-prosiding bagi penetapan kos-kos tersebut dengan mengemukakan di pejabat pendaftaran bil kos dan suatu salinannya berserta dengan segala kertas dan baucar yang perlu.

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21(1) Jika prosiding bagi penetapan telah dimulakan dengan sewajarnya mengikut kaedah 20, maka tertakluk kepada perenggan (2) kaedah ini dan kaedah 23, Pendaftar hendaklah memberi kepada pihak yang memulakan prosiding dan kepada mana-mana pihak lain yang berhak untuk didengar dalam prosiding penetapan itu, tidak kurang daripada 7 hari notis mengenai hari dan masa yang ditetapkan untuk penetapan.

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A (2) Sesuatu notis di bawah kaedah ini tidak perlu diberikan kepada mana-mana pihak yang belum memasukkan kehadiran atau mengambil apa-apa bahagian prosiding yang mengakibatkan prosiding penetapan itu:

B Dengan syarat bahawa perenggan itu tidaklah terpakai jika perintah penetapan bagi bil kos peguamcara yang dibuat di bawah Akta Profesion Undang-Undang 1976, atas permintaan peguamcara itu, mengakibatkan prosiding penetapan itu.

C Dari segala afidavit dan lampiran-lampiran kepadanya, saya mendapati fee yang dituntut oleh defendan tidak dilakukan seperti yang dikehendaki oleh A. 59, K. 20 dan 21 tersebut,
...

D I find no reason to differ from the above decision. Indeed, I am persuaded that His Lordship's reasoning is correct.

E [21] Learned counsel for the auctioneer submitted that this court should not interfere with the quantum allowed by the learned deputy registrar. It is the considered opinion of this court that the ground for review in this instant case is not limited to a question of quantum. In the case of *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2007] 2 CLJ 332, Nik Hashim FCJ had this to say:

F [4] On an application for review under O. 59 r. 36(5) of the RHC the judge may make such order as the circumstances require. By its terms the provision confers on the judge a discretion. But the discretion is not unfettered. It must be exercised judicially. The judge should not interfere with the taxing registrar's decision unless there is an error of principle or some other material error (*Diversey (Far East) Pte Ltd v. Chai Chung Ching Chester & Ors* (No. 2) [1993] 1 SLR 542; *Chan Kok Choon JP v. MBF Finance Bhd* [2000] 4 CLJ 453) or the quantum allowed is obviously wrong (*Starlite Ceramic Industry Ltd v. Hiap Huat Pottery* [1973] 1 LNS 143; [1973] 1 MLJ 146) or the registrar has exercised his discretion capriciously or mischievously:
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H *Corbett v. Ipoh Tin Dredging Ltd* [1935] 1 LNS 33; [1936] MLJ 222 at p 224; see also Malaysian High Court Practice, 2001 Desk Edition 1 p 1933. Generally speaking, the discretion of the registrar on taxation is final (see judgment of Sir John Leach, MR in *Alsop v. Oxford (Lord)* [1833] 1 My. & K. 564, which was
I quoted with approval by Abdul Malek Ahmad FCJ (as he then

was) in *Gooi Hock Seng v. Chuah Guat Khim* [2001] 1 CLJ 583; see also *Llyods Bank plc v. Ang Cheng Ho Quarry & Ors* [1993] 2 CLJ 210 where taxing officer on quantum will not be interfered with.

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[22] In my judgment, in this instant case, the learned deputy registrar had exercised his discretion capriciously or mischievously. He failed to take account and/or erred in that:

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a) No proper Bill of Costs that meet the requirement of Order 59 Rule 20 of the RHC was filed;

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b) No evidence was provided to justify the cost claimed. This is especially so with the fee of RM117,507.50 claimed by the Auctioneer;

c) The Auctioneer clearly prepared and submitted his Bill of Costs dated 16.7.2007 to claim for “commission” which was only payable if rule 7(b) applies. The reference in the Bill of Costs to rule 5 of the Enactment which stipulates the full scale fees of commission payable to Auctioneers for successful auction clearly proves that the Auctioneer had used this as his basis for calculating the half portion of commission claimed by him. *The learned deputy registrar failed to realize that the Auctioneer had in other words, not make any claim pursuant to rule 7(a). On this basis alone, the Auctioneer technically is not entitled to a single cent, particular the fee of RM117,507.50 claimed. The learned deputy registrar is not entitled under such circumstances to still award the Auctioneer remuneration purportedly under rule 7(a) by reference to rule 7(b). (emphasis added).*

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d) The learned deputy registrar clearly had fettered his discretion when he adopted the fixed half commission payable under rule 7(b) and rule 5 of the Enactment as the remuneration payable under rule 7(a) to the Auctioneer and claims that he had exercised his discretion thereby. He took the easy way out and used the half commission scale under rule 7(b) and passed it off as exercising his discretion under rule 7(a) to award the cost thereunder. The Court of Appeal in *Tan Beng Sooi (supra)* had clearly disapproved such a practice of stipulating a fixed sum as the remuneration under rule 7(a) or any remuneration which is arrived at without conducting a proper taxation involving the judicial consideration of established principles and factors; and

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- A e) In fact, no established factors were ever proved and thus, not considered. Established factors for ascertaining quantum of costs are for example: time expended, skills expended, amount involved, properties involved, where the transaction took place and so on.
- B In short, the learned deputy registrar had merely awarded what was billed by the auctioneer, without a proper taxation.
- C [23] However, this is not the end of the matter. There is another issue to be resolved. Learned counsel for the auctioneer submitted that the proposed intervener has no *locus standi* to participate in the taxation proceedings, let alone to challenge it. The argument of learned counsel is simply this: Learned counsel for the intervener had submitted that taxation of costs must be done according to the provisions of O. 59 rr. 20 and 21 of the RHC, relying on *Public Bank Berhad v. Er Cheng Chan (supra)*. Order 59 r. 21(2) states that the notice of taxation need not be given to any party who has not entered appearance or taken any part in the proceedings which gave rise to the taxation proceedings. In this instant case, the intended intervener is not a party to this proceedings as he had not obtained leave to intervene and had not taken any part in this proceedings.
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- F [24] In my considered opinion, the submission has no merit. The cost here affects the proposed Intervener and he is disputing the cost. In *Tan Beng Soo's* case (*supra*), Low Hop Bing JC clearly ruled that taxation according to O. 5 rr. 20 and 21 which is initiated by filing of bill of cost and of course the other party must be notified.
- G [25] The proposed intervener should be given an opportunity of being heard because his rights will be affected by the learned deputy registrar's decision. In this instant case, it is not disputed that the proposed intervener's "legal interest" is directly affected by the proceedings. The question is this: will the proposed intervener's rights or liabilities be directly affected in these proceedings. The answer is in the affirmative.
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Conclusion

- I [26] In conclusion, this court is of the considered opinion that the amount of award (RM118,007.50) was clearly a result of the application of the wrong principles and thus is devoid of any basis.

What is glaring in this case is that the auctioneer submitted a bill of cost to claim “commission” when all that he is entitled to is “remuneration”.

[27] At best, only the sum of RM851 for actual out of pocket expenses and RM804 pocket expenses and RM804 disbursement in the bill of cost are claimable but not the claim of RM118,507.50 which the auctioneer clearly claimed as “Fees – r. 5 of the Enactment” which the auctioneer was not entitled to.

[28] For reasons above stated, the proposed intervener’s application for review is allowed. The sum of RM118,007.50 to be set aside and only the sum of RM851 and RM804 is awarded. There is no order as to costs.

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